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No. 2643.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,
Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COMPANY, a corporation,
Defendant in Error.

SUPPLEMENT TO DEFENDANT IN ERROR'S BRIEF ON RE-ARGUMENT

In Error to the United States District Court for the Northern District of California, Second Division.

HOEFLER, COOK, HARWOOD & MORRIS,
ALFRED J. HARWOOD,
Attorneys for Defendant in Error.

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At the re-argument on May 24th, the Court ordered that both parties should file their briefs within fifteen days. The brief of Defendant in Error on Re-Argument (filed on June 26th) was printed and ready for filing on June 8th, but on that date counsel for Plaintiff in Error stated that their brief was not yet completed, whereupon it was stipulated by us that the time should be extended for five days. Subsequently, at the request of counsel for Plaintiff in Error, the

time was further extended. As we had prepared our brief within the period of fifteen days and as the last extension requested by counsel had the effect of allowing them thirty days' time for their brief, we requested counsel to stipulate that we might (if we so desired) file a supplement to our brief on re-argument. This supplement to our brief on re-argument is filed in pursuance of that stipulation.

In the brief of Plaintiff in Error last filed (p. 40) the contention is again made that "the orders of the Commission entered after October 10, 1911, preserving the *status quo* may be sustained as rate fixing orders under the provisions of the Eshleman Act giving the Commission the power to fix rates."

This contention was replied to at pages 118 to 123 of Brief of Defendant in Error first filed.

It was there pointed out that the orders referred to do not purport to establish any rates and it was further shown that the Commission had no power to establish rates violative of the prohibition except upon application of the carrier and after investigation of the carrier's application. The carrier was obliged to prove its case and to show not only a valid excuse for the lower rate for the longer distance but also that the rate to the intermediate point was reasonable. The provisions of the amended Section 21 of Article XII of the Constitution are mandatory

and prohibitory; they provide the way in which a carrier can obtain the sanction of the Commission to the charging of higher rates to intermediate points. The amended Section 21 provides that "It shall be unlawful * * * to charge or receive greater compensation * * * for a shorter than for a longer distance." If that had been the entire provision the Commission could not have established any higher rates to less distant points; but that was not the entire provision. There was added the proviso that upon application of a carrier, and after investigation, the Commission might in special cases authorize the charging of higher rates to intermediate points. Upon the clearest principles of statutory construction the proviso must be construed as exclusive of any other means of obtaining relief. Proof that a rate was "established" by the Commission is not proof that the rate (violative of the long and short haul clause) is legal because it is not proof that it was authorized by the Commission in pursuance of the provisions of Section 21 of Article XII of the Constitution. If it had been the intention that the Commission could establish rates violative of the prohibition without the application of the carrier and the investigation of the Commission, such intention would have been evidenced by another proviso to the effect that a carrier might charge higher rates to the intermediate points in cases where such higher rates

were established by the Commission. But the section does not contain such a proviso.

If the Commission could establish rates violative of the prohibition of Section 21 of Article XII in the absence of the application and investigation required by that section the long and short haul prohibition would be practically nullified. If that were the proper construction of the prohibition a carrier might file a tariff containing rates violative of the prohibition and the Commission might "approve" the tariff and all rates in the tariff in violation of the prohibition would be legal notwithstanding that some of them might be violative of the prohibition. The prohibition would be reduced to a mere rule for the guidance of the Commission in establishing rates.

When the Commission establishes a rate it considers whether or not that rate is reasonable, but when it investigates an application under Section 21 of Article XII, it not only considers the reasonableness of the rate, but also another rate, that is, the lower rate to the more distant point. With reference to the last mentioned rate the Commission determines the sufficiency of the alleged excuse for maintaining a lower rate to the more distant point. It also considers the relation of the two rates and the question as to whether the lower rate to the more distant point is likely to unduly burden the traffic to the less distant point.

Let us assume that the Commission initiated a proceeding to establish rates from San Francisco to Fresno. They would receive evidence as to what was a reasonable rate for the service. They might or they might not have brought to their attention the rates charged by the carrier to more distant points. Both Congress and the people of California deemed that there should be almost an absolute prohibition against charging more for the shorter distance. They clearly indicated the method by which relief could be obtained from this prohibition. It necessarily follows that that method must be pursued.

We have already seen that the orders made after October 10, 1911, do not purport to grant any of the applications of the carriers, but merely purport to allow the carriers to file supplements to their tariffs containing higher rates to intermediate points.

We have also seen (assuming for the sake of the argument that they did purport to grant such applications) that they affirmatively show that they were not preceded by the investigation required by the Constitution, and that they are ineffective as orders of relief because made without investigation. It is contended that they could be sustained as "rate fixing orders." But they would not purport to fix any rates. They would merely purport to authorize the carrier to charge higher rates to the intermediate

points, and coupled with this authorization would be a statement that the Commission "does not concede the reasonableness of any of the higher rates or fares to intermediate points, all of which rates and fares will be subject to investigation and correction."

In *Phoenix Milling Co. v. S. P. Co.*, 7 C. R. C. 677 (p. 54 of last brief filed by Plaintiff in Error) the Commission with reference to the orders made after October 10, 1911, said:

> "The Commission did not, however, by these orders sanction or approve any of the rates covered by the defendant's application which were in violation of the long and short haul provision. *In fact, it expressly withheld its approval of such rates.*"

It is obvious that the orders of November 20, 1911, and January 16, 1912, cannot be distorted into "rate fixing orders." An order purporting to establish rates which recited that the Commission did not concede the reasonableness of the rate sought to be established would not be an order establishing a rate. It would show affirmatively that the very matter which the Commission was called upon to determine before it established the rate had not in fact been determined.

An intention to establish rates would not appear from an order which recites that the reasonableness

of the rates had not been ascertained by the Commission.

From another provision of the orders of November 20, 1911, and January 16, 1912, it is clear that the orders did not purport to "establish" any rates. These orders merely purport to grant the carrier permission to "file *for establishment* with the Commission in the manner prescribed by law and in accordance with the Commission's regulations such changes in rates and fares as would occur in the ordinary course of their business," etc. (Record, p. 404 and p. 424.)

The changes which the carriers were permitted thereafter to file were not "established" by the orders of November 20, 1911, and January 16, 1912, but were merely permitted to be filed "for establishment" thereafter by the Commission. There is no pretense that any rates here involved were contained in any such supplements filed by the carrier or that any such rates were thereafter established by the Commission.

We have seen that the orders made by the Commission since October 10, 1911 (to wit, the orders of October 26, 1911, November 20, 1911, and January 16, 1912) do not purport to grant any of the applications of the carriers. They merely relate to the filing by the carriers of supplements to their tariffs.

The Commission, however, contends that the orders were made to preserve the so-called "*status quo.*" In the case of *Phoenix Milling Co. v. S. P. Co.,* 7 C. R. C. 677, cited by Plaintiff in Error, the Commission said:

> "By this order (the reference is to the order of October 26, 1911) the carriers were impliedly granted permission for practical reasons *to maintain the* status quo *until the Commission passed upon such applications.* By a subsequent order issued on November 20, 1911, in the same proceeding, express permission so to do was given."

The orders made after October 10, 1911, did not purport to establish any rates.

Beyond question these orders were made because of the erroneous views entertained by the Commission with reference to the effect of Section 21 of Article XII of the Constitution as amended October 10, 1911. The Commission erroneously assumed that the Constitutional prohibition was not effective until the Commission so ordered. They deemed these orders were proper before carriers should be permitted to file changes in or supplements to their tariffs containing higher rates to intermediate points.

The Commission in *Phoenix Milling Co. v. S. P. Co., supra,* states that the orders were made for the purpose of "maintaining the *status quo*" pending investigation.

But whether they were made with the one intention or the other, it is most obvious that they were not intended to be "rate fixing orders."

It cannot be said that orders made with the intention of preserving the *"status quo"* pending investigation can be upheld as "rate fixing orders." The Commission had no power to preserve the so-called *"status quo"* and the orders made were not worth the paper upon which they were written.

The intention of the Commission (according to its contention) was to preserve the so-called *"status quo"* pending investigation. The Commission had no authority to make such an order. The intention was illegal. The orders were made (assuming for the purpose of the argument that the Commission's contention as to why they were made is correct) for an illegal purpose—for a purpose which could not be accomplished.

The proposition that such orders, which could not, under the law, to any extent whatsoever carry out the intention of the Commission, can be sustained as "rate fixing orders" is startling.

Because the Commission deemed it had the power to preserve the so-called *"status quo"* pending investigation, and made an order intended to have the effect of preserving the *"status quo,"* it by no means follows that the Commission desired to establish the

rates which the carriers were then claiming the right to charge.

If the Commission had known that it could not thus maintain the *"status quo"* it is clear that the orders would not have been made at all. There is absolutely no reason for assuming that if the Commission had known it could not thus preserve the *"status quo"* it nevertheless would have established rates violative of the Constitutional prohibition. If the Commission had been correctly advised as to the law, instead of attempting to establish rates violative of the prohibition, it doubtless would have proceeded to a determination of the applications of the carriers for relief and pending the determination of the applications would have required the carriers to obey the law. There is no reason to suppose that it would have attempted to establish any rates violative of the prohibition pending the determination of the applications of the carriers.

The contention that the orders made after October 10, 1911, "may be sustained as rate fixing orders" is unsound for each of the following independent reasons:

1. A rate violative of the prohibition can be legalized only after the application and investigation required by Section 21 of Article XII. The method there prescribed is exclusive.

2. The orders referred to do not purport to establish any rates. They merely purport to grant the carriers permission to "file *for establishment* with the Commission in the manner prescribed by law and in accordance with the Commission's regulations such changes in rates and fares as would occur in the ordinary course of their business." (Record p. 404 and p. 424.) The rates filed in pursuance of the orders were to be *thereafter* established by the Commission.

3. The orders referred to show affirmatively that the Commission had not passed upon the reasonableness of the rates involved. An order which affirmatively shows that the Commission had not passed upon the reasonableness of the rates cannot be construed to be a "rate fixing order."

4. The Commission contends that the orders referred to were made for the purpose of preserving the so-called *"status quo"* pending the investigation required by the Constitution. Considered as such orders they were illegal and void. There is no reason to suppose that if the Commission has been correctly advised as to the law and had known that it could not preserve the so-called *"status quo"* pending investigation it nevertheless would have established rates which it knew were illegal.

The opinion in the case of *Phoenix Milling Co. v. S. P. Co.*, 7 C. R. C. 677, printed at pages 46 *et seq.* of the last brief filed by Plaintiff in Error, confirms our statement that the Commission assumed it could read into Section 21 of Article XII a provision similar to the second proviso of the 4th Section of the Act of Congress. It appears therefrom (p. 48) that in at-

tempting to preserve the so-called *"status quo"* the Commission thought that it was "following the procedure of the Interstate Commerce Commission in similar matters." Now, as we have seen, the "procedure" of the Interstate Commerce Commission was based upon the second proviso of the 4th Section, which proviso was not adopted into Section 21 of Article XII of the Constitution. The ~~preservation of the~~ *status quo* of interstate rates was not preserved by any action or procedure of the Commission, but by the terms of the Act of Congress itself.

In the last brief filed by Plaintiff in Error, the statement is made that we did not answer the argument to the effect "that by making the Eshleman Act a part of the Constitution" the Legislature intended to prevent the "business confusion and chaos" which counsel say would result from the immediate operation of the Constitution as amended October 10, 1911.

This contention is replied to at pages 27 to 27b of the last brief filed by Defendant in Error, and also at pages 59 to 64 and 72 to 76 of Supplemental Brief of Defendant in Error.

The provisions of the Eshleman Act mentioned by counsel are referred to at pages 104-105 and 119-122 of Defendant in Error's first brief, at pages 48-54 of Defendant in Error's Supplemental Brief and at

pages 8-26 of Defendant in Error's Brief on Reargument.

Referring to the supposed case of a carrier who started in business after the amendment to the Constitution of October 10, 1911, counsel state:

> "The carrier might, as it probably would in the case supposed by counsel, go to the Commission with a schedule of rates which it thought was reasonable and just, and ask the Commission to adopt those rates, or such modification thereof as the Commission might think proper."

After making the foregoing statement counsel contend that a higher rate to the intermediate point specified in such schedules would be legal.

Now we did not suppose that counsel would attempt to answer the argument in any other way. To have conceded that such a rate was illegal would have been an admission that the so-called "existing" rates would become illegal upon the adoption of the amendment to the Constitution of October 10, 1911.

It is obvious that a carrier starting in business after October 10, 1911, would be required to "go to the Commission" with a schedule which did not contain rates violative of the Constitutional prohibition. If such carrier desired to obtain authority to charge higher rates to intermediate points, authority to do so would have to be sought and obtained in the manner provided in Section 21 of Article XII of the

Constitution. An order of the Commission "adopting" a schedule specifying higher rates to intermediate points would not render such rates legal, as that is not the manner in which such rates can be legalized under the Constitution as amended.

The case of *Kellogg v. Michigan Central,* 24 I. C. C. 604, which is referred to at page 13 of the printed copy of the second oral argument filed by Plaintiff in Error was not actually cited at the oral argument; hence it was not referred to in our Brief on Re-argument. In that case the Commission did not, as stated by counsel, hold that there was "no warrant for the violation of the 4th section." That is, they did not hold that in the past there was no warrant for the violation of the section, but merely held that there was no warrant for the continuance of the violation.

From the opinion of the Commission it would seem that the rate in question, which was in effect on and prior to June 18, 1910, the date of the amendment to Section 4, was continued in force by an application for relief. The case of *Kellogg v. Michigan Central, supra,* was not an application for relief under the provisions of the fourth section, but was a complaint to have a rate reduced because of alleged discrimination. The Commission said (p. 606):

> "It is unjustly discriminatory against Battle Creek and complainant to charge higher rates

on this traffic to Battle Creek than to Detroit, Toledo and Cleveland."

All that the Commission said was that as to rates to be charged in the future there was no warrant for a departure from the prohibition of the 4th section—that is, that there was no warrant for the continuance of the violation of the 4th section. The 4th section provides that no rates lawfully existing at the time of the passage of the amendment to the section should be required to be changed "by reason of the provisions of this section" until after the expiration of six months or where applications for relief are pending.

Counsel for plaintiff in error in referring to *Merchants & Manufacturers Traffic Assn. v. U. S. et al.*, 231 Fed. 292, state that the decision was by a divided court. The decision in the case at bar does not in any manner depend upon the decision in that case and whether the majority of the court or the dissenting judge is right is immaterial here. At page 22 of our Brief on Re-argument we quoted from the decision of the court to the effect the Commission cannot "suspend the long and short haul clause of Section 4 of the Act to Regulate Commerce without an application being made to it by the carriers for that purpose and a hearing upon that particular application as in a special case."

The decision was cited as authority for the self-evident proposition that an investigation was a necessary prerequisite to an order of relief. Judge Bledsoe, who dissented from the decision of the court, did not disagree with this view but expressly coincided with it. Judge Bledsoe said:

> "It was the judgment of the Commission, *after investigation*, that was to warrant the setting aside of the statutory rule, and the provision for the making of an 'application' was intended merely as a means of securing such investigation and judgment. The making of an application by the carrier was of the form, perhaps, but not of the substance of the proceeding; it was a mere means to an end, and should not, in my judgment, be confounded with the end itself."

The majority of the court held that in addition to the investigation an application was necessary. Judge Bledsoe dissented from this view but all the judges held that an *investigation* was a necessary prerequisite to an order of relief.

We are not really concerned in the case at bar with the question as to whether an application is required to be filed before an order of relief can be made.

It is clear, however, that whether or not an application is required by the Act of Congress, it is required by Section 21 of Article XII of the Constitution of California. The provisions of the Constitution are mandatory and prohibitory; those of the Act of Congress may be directory merely. Judge Bledsoe was

of the opinion that the provision of the Act of Congress requiring an application was directory; but our Constitution could not be so construed.

Section 22, Article I of Constitution.
Matter of Maguire, 57 Cal. 604.
Knight v. Martin, 128 Cal. 245.
McDonald v. Patterson, 54 Cal. 247.
Navajo Mining Co. v. Curry, 147 Cal. 581.

With reference to the decision in *Merchants etc. Assn. v. U. S., supra,* counsel in their last brief state that we were in error in stating at the oral argument that there was no difference of opinion and no question so far as the regularity of the Commission's investigation was concerned. The statement is then made that this is one of the main questions in the case.

Both the opinion of the court and the dissenting opinion assume that there was an investigation. There is nothing in either opinion which would indicate that there was any question as to whether or not there had been an investigation. The only point decided by the court was that the order was void because not preceded by an application. Judge Bledsoe in his dissenting opinion said:

> "In the case at bar it stands as indubitably true that a hearing and extended investigation was had by the Commission, and that their conclusions embraced in the order complained of were the result of most careful consideration."

Doubtless in presenting their application to the Supreme Court for a writ of supersedeas, counsel for

the carriers relied upon the fact that an investigation had been made by the Interstate Commerce Commission, and they doubtless argued that under the Interstate Commerce Act the provision requiring an application was directory merely. But we do not think that they argued that an order of relief made without investigation was valid. It was not incumbent upon them to do so, as the evidence in the case undoubtedly showed that there had been an investigation.

Respectfully submitted,

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